BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: JD² INCORPORATED 12970 Earhart Avenue, Suite 210 Auburn, CA 95602-9022 Employer	Docket No. 02-R4D4-2693 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken both the petitions for reconsideration filed in the above entitled matter by JD² Incorporated (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between January 30, 2002 and February 4, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 8800 Whittier Boulevard, Pico Rivera, California (the site).

On May 31, 2002, the Division issued a citation to Employer alleging a serious violation of section 1670(a) [fall protection] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1] with a proposed civil penalty of $16,200.

Employer filed a timely appeal contesting the existence and classification of the alleged violation as well as the reasonableness of both the abatement requirements and the proposed civil penalty. Employer also alleged affirmative defenses.

On May 14, 2003, a hearing was held before an Administrative Law Judge (ALJ) of the Board in West Covina, California. Ron Medeiros, Attorney, represented Employer. David Pies, Staff Counsel, represented the Division.

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On June 4, 2003, a decision was issued by the ALJ which upheld the citation and assessed a civil penalty of $16,200. The decision was served upon counsel for the parties and the Concord District Office of the Division, which was not the office from which the citation originated.

On June 25, 2003, a purported copy of the original June 4, 2003, decision was re-mailed to the parties in an attempt to mail the decision to the proper Division office in West Covina. The document mailed to the parties on June 25th was different from the document originally mailed on June 4 in both substance and result since it granted Employer's appeal from the alleged violation of section 1670(a)

On July 21, 2003, the ALJ issued an Errata which indicated that, due to clerical error, the document captioned "Decision" mailed on June 25, 2003, was a copy of an earlier draft instead of a copy of the final draft Decision. The ALJ indicated that the document mailed on June 25, 2003, was not the intended Decision of the ALJ and should be considered null and void, and further, stated that "[t]he Decision served on June 4, 2003 is the Decision in this case."

On July 8, 2003, Employer filed a petition for reconsideration of the Decision issued and served on June 4, 2003. In an order dated July 21, 2003, the Board took Employer's petition for reconsideration under submission and issued a stay of the ALJ decision pending a decision upon reconsideration by the Board. In its order, the Board referenced the Errata issued by the ALJ which clarified that the intended ALJ decision was the decision issued and served on June 4th, and based upon said Errata, ordered that the document mailed on June 25, 2003, "shall be considered null and void."

On August 25, 2003, Employer filed a second petition for reconsideration seeking review of both the ALJ's Errata issued on July 21, 2003, and the Board's Order taking Employer's petition for reconsideration under submission issued on July 21, 2003. On October 14, 2003, the Board issued an order taking Employer's August 25th petition for reconsideration under submission and further ordered that the two petitions for reconsideration filed by Employer on July 8 and August 25 be consolidated.

EVIDENCE

The Division issued a citation to Employer for failure to require its employees to use fall protection.

On January 30, 2002, Associate Cal/OSHA engineer Gary Robinson (Robinson) began an investigation at the site regarding a fatal accident to employee foreman Donald R. Parish (Parish) that happened earlier that day. Robinson observed that the site consisted of a building under construction where workers were in the process of installing metal decking over metal joists.

He took some photos of the site on January 30, 2002, showing the partially installed metal decking. Employer stipulated that the decking was 22 feet 33 inches above a concrete floor.

Robinson returned to the site on January 31, 2002, to continue his investigation. Robinson interviewed Randy Gonzales (Gonzales). Gonzales told Robinson that he was the foreman. On the day of the accident, Gonzales and an apprentice began the job of installing metal decking. The sheets were three feet wide and up to 35 feet long. Later, Parish came to help and Gonzales sent the apprentice away.

Somewhere around 2:30 p.m., a hole was created between the place where the leading edge of already installed sheets of metal decking had been laid and a bundle of decking not yet laid out. Gonzales said that Parish turned to take a piece of decking from the pile when he stepped into the hole. He fell to the concrete floor below, dying later that day from his injuries.

On January 31, 2002, Robinson took photographs of the hole through which Parish fell and a photograph of the pile of decking next to where Parish fell. Exhibit C, taken the previous day, shows the hole at a distance. The hole did not have any guard rails or demarcation lines. Neither Gonzales nor Parish was wearing fall protection.

Robinson interviewed Field Superintendent Greg Hall (Hall). Hall said that he and Gonzales met before installation began. They discussed using fall protection, but decided it was too dangerous. Gonzales said he was going to use the controlled access method. Gonzales told Robinson that they were staying six feet away from fall danger areas.

Pursuant to his request, Robinson received a copy of Employer's incident report, signed by General Manager Tracy Cody. According to the report, the building under construction was a Target store.

Robinson classified the violation as serious because the most probable injuries in the event of a fall over 22 feet onto a concrete floor are fractured skulls, serous concussions multiple broken bones, and death.

ISSUES

1. Which of the two documents entitled "Decision" is the ALJ decision in this case?
2. Is the ALJ's determination of Employer's liability for a violation of section 1670(a) in the Decision issued and served on June 4th supported by the evidence?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Employer filed two petitions for reconsideration in this case seeking reconsideration of the ALJ Decision issued and served on June 4, 2003, the Errata issued by the ALJ, and the Board's subsequent order taking Employer's petition for reconsideration under submission issued on July 21, 2003.

1. The ALJ Decision Served on June 4, 2003, is the Effective ALJ Decision in this Case.

In its petition for reconsideration of the Decision served on June 4th, Employer referenced another document entitled "Decision" which was "remailed" to the parties on June 25, 2003, that contained a different analysis and result from the Decision served on June 4, 2003.

Based upon the apparent inconsistent decisions sent to the parties and raised by Employer in its petition for reconsideration dated July 8, 2003, the Board requested the ALJ to clarify her intent with respect to the two decisions mailed to the parties. On July 21, 2003, the ALJ issued an Errata which addressed the circumstances regarding the two documents and clarified that the Decision issued and served on June 4, 2003, is the intended decision, and that another earlier draft decision was sent by clerical error to the parties on June 25, 2003. On July 21, 2003, in its order taking Employer's petition for reconsideration under submission, the Board ruled that the June 25th document was "erroneously sent and shall be considered null and void, and is set aside" based upon the Errata issued by the ALJ.[2]

The Labor Code and Appeals Board regulations provide that the Board may assign any proceeding to an administrative law judge for hearing, order, and decision. (Labor Code §§ 6605; 375.1) Within 30 days after the proceeding is submitted (unless otherwise extended by the Board or ALJ) the ALJ must make findings upon all of the facts involved in the appeal, and file an order or decision with the reasons or grounds upon which the order or decision was made. (Labor Code §§ 6608; 385(a)) The order or decision must be signed and dated, and a copy must be served on each party (§ 385(b)-(c)).

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[2] Employer argues that the Errata is a final order subject to reconsideration since it determined which of two decisions was effective. Employer misconstrues the Errata which did not constitute a new determination regarding the disposition of the case but merely explained which of the two decisions the ALJ intended to issue and explained that the June 25th document was mailed as a result of a clerical error. An examination of the proofs of service for the two documents supports such error since they show that the June 25th document was being "re-mailed" to a different Division office. The error was made in attaching a previous draft of the decision which ultimately was not the intended analysis and disposition of the ALJ. Employer has not provided any legal authority establishing that the fact that such preliminary draft was mailed to the parties in error that it nonetheless constitutes an effective decision or supplants the decision issued and mailed earlier.

The above provisions contemplate and provide for *a single* decision to be rendered by the ALJ assigned to the proceeding. The Decision dated and served June 4, 2003, complied with all of the above requirements for rendering an effective decision in the proceeding. On July 15, 2003, the Board reviewed said decision in the regular course of reviewing ALJ decisions. Only when the Board received Employer's petition for reconsideration filed on July 8, 2003, was the Board informed of the purported Decision mailed to the parties on June 25, 2003, containing a different analysis and result. The Board requested clarification from the ALJ regarding the two documents. The Errata issued by the ALJ sufficiently clarified that the mailing of the second purported Decision was due to a clerical error. Given the lack of any other evidence before the Board indicating that the document titled "Decision" mailed to the parties on June 25, 2003, was other than the result of a clerical error,[3] the Board properly concluded that the document mailed on June 25, 2003, was null and void, i.e., was not to be considered a disposition of the proceeding before the ALJ.

Since the authority regarding the issuance and service of a decision by an assigned ALJ following a hearing in a proceeding, only provides for a single decision,[4] and in view of the ALJ's Errata which clarified the mailing of the two documents and her intent regarding the matter, we find that the decision issued and served on June 4, 2003, is the only effective ALJ decision issued in the instant case.

2. The Evidence Does Not Support a Violation of Section 1670(a).

In the Decision dated and served on June 4, 2003, the ALJ determined that Employer violated section 1670(a). However, the Board's independent review of the evidence convinces it that the appropriate section to apply to these facts is section 1710(h).

The Division cited employer under section 1670(a), which provides as follows:

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[3] Employer suggests that the fact two decisions were prepared by the ALJ and the later draft holding Employer liable was the draft initially sent to the parties, is evidence of a conspiracy or undue influence. The Board finds that such contention is not based upon a single fact upon which a conspiracy or undue influence can be reasonably inferred. The Board does not find it unusual for a decision-maker to formulate different approaches, analyses, or results in the decision making process. The fact that an earlier draft of the decision favored Employer does not render that analysis effective when the decision that gets issued and served upon the parties is different. Nor does the Board believe that a clerical error in sending an earlier draft of the decision subsequent to serving the final and intended decision of the ALJ constitute facts which sufficiently justify any inference of wrongdoing. To transform a clerical error of mailing into a violation of judicial ethics provisions, conspiracy, and undue influence upon the ALJ is not supported by any facts or other credible information provided to the Board.

[4] The Board also finds that the fact that the Decision was mailed to the wrong Division District Office on June 4th does not render the decision ineffective. The Division was represented by counsel at the hearing proceeding and its counsel was served with a copy of the Decision as shown on the proof of service.

> Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7½ feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders. …"

The parties agreed that foreman Gonzales and Parish were working at a height of over 22 feet, neither of them was wearing fall protection, and there were no guard rails around the hole. Since Parish fell through a hole, it follows that Employer's employees came within the zone of danger. (*Bethlehem Steel Corp.*, Cal/OSHA App. 76-552, Decision After Reconsideration (May 21, 1981).) Employer argues that the applicable safety order was section 1710(h) and that section 1670(a) does not apply. To establish the defense that a more specific safety order applies, Employer must show that the general order is inconsistent with a more specific order (See *W & S Roofing, Inc.*, Cal/OSHA App. 74-248, Decision After Reconsideration (Oct. 30, 1974)) and that Employer complied with the more specific order. (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001) p.6, citing *Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).) An employer does not have to present independent evidence but may rely upon evidence presented by the Division to establish its affirmative defense. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607; Cf. *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), p. 5))

Our review of Robinson's photographs clearly reveals a structure with large, open spans and areas. (Exhibits 3, 11, 12, 13 and C). The 3'x35' decking pieces look tiny on the decking area, even though the photographs do not show the whole area being decked. The area under the deck is open except for vertical stanchions so widely placed apart that they do not detract from the large, open area being covered.

> At the time of the accident, section 1710(h)[5] provided as follows:
> (h) Buildings or Other Structures with Large, Open Spans. Employees working on buildings or other structures with large, open spans or areas, such as mill buildings, gymnasiums, auditoriums, hangars, arenas, stadiums and bridges, shall be protected from the hazard of falling in accordance with Sections 1669, 1670 and 1671 when the fall height exceeds 30 feet. …"

Both sections 1670 and 1710 are construction safety orders. Section 1670 is a general personal fall protection order. Section 1710, being a structural steel erection order, is more specific. Section 1710(h) is in direct

[5] Section 1710(h) has since been amended.

conflict with section 1670(a) since the fall protection distance for section 1670(a) is 7½ feet, but the fall protection distance for section 1710(h) is 30 feet.

The Division argues that section 1710(h) does not apply because the building was a retail store. The Board has held that the list in section 1710(h) is only illustrative, not exclusive, but that it does not include warehouses. (*McLean Steel, Inc.*, Cal/OSHA App. 93-1851, Decision After Reconsideration (Aug. 26, 1997).) The Board believes that *McLean Steel* was decided incorrectly and reverses that holding. The Board notes that the phrase "such as" is illustrative as opposed to definitive. It appears to the Board that a warehouse contemplates the same sort of open span or area as the other structures which are delineated in section 1710(a). The Board fails to see any meaningful distinction between an auditorium open span, for instance, and a warehouse open span such as the building being constructed in this case.

In the Board's view, the language in section 1701(h) was meant to include warehouse type buildings and that the 30 foot fall protection limit for workers was adopted to include installation of metal decking which is exactly what appears to have been installed by the worker in this case.

Accordingly, it is found that section 1710(h) applies to the facts of this case. Since the fall distance here was less than 30 feet, Employer was in compliance.

DECISION AFTER RECONSIDERATION

The Board reverses the ALJ's decision and hereby grants Employer's appeal. The assessed civil penalty is set aside.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 16, 2004